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No. 00-_____

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN, Petitioner,

v.

RONALD DEAN COMBS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
(no date of execution scheduled)

QUESTIONS PRESENTED

I.

Shortly after shooting two women, Ronald Combs was asked, "What happened?" He responded, "Talk to my lawyer."

The question presented is whether the Fifth Amendment prohibits evidence of this response, when (a) it occurred before *Miranda* warnings and (b) the prosecution offers it to rebut a defense of mental incapacity.

II.

Whether, under *Strickland v. Washington*, 466 U.S. 668 (1984), there is "prejudice" when, in addition to the prosecution's evidence of the defendant's guilt, the cross-examination of a defense witness yields testimony confirming the defendant's guilt.

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The Attorney General of Ohio, on behalf of Margaret A. Bagley, warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-48a,[1] is reported at 205 F.3d 269 (6th Cir. 2000). The opinion of the district court, App. 51a-270a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2000, and a petition for rehearing was denied on March 28. On June 5, an extension of time for filing this petition was granted until August 25, 2000. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

3. The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

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[1] "App." refers to the separately bound Appendix to this petition.

STATEMENT OF THE CASE

There is no dispute that respondent Ronald Combs pulled the trigger of the shotgun that killed Peggy and Joan Schoonover, the mother and grandmother of his three-year-old son, Joey. The homicides occurred in Cincinnati in broad daylight at the end of the workday and were witnessed by several bystanders, including a uniformed deputy sheriff, James Neil. Immediately after these killings, when Neil ordered Combs to freeze, Combs responded with an apparent attempt to shoot Neil, at which point Neil shot and severely wounded Combs.

The two questions presented in this petition concern evidence at Combs' murder trial relating to his cognitive capacity at the time of these homicides.

1. The murder trial

Combs' defense was that he was too intoxicated to commit the homicides intentionally and with "prior calculation and design," Ohio's term for premeditation. Although there was evidence of intoxication, there also was considerable evidence of intent and premeditation. Combs had become estranged from Peggy Schoonover, and Combs blamed Peggy's mother, Joan, for coming between him and Peggy. This estrangement also prevented Combs from seeing his son Joey, a development that particularly upset him. Tr. 911.[2]

More specifically, Combs' cousin Tony Liming testified that on the afternoon of the homicides, July 15, 1987, Combs had told Tony that he needed a gun. Combs drove Tony from Cincinnati to Mt. Orab, a rural town about 30 miles away, to see if Combs could borrow a gun

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[2] "Tr." refers to the transcript of the trial, copies of which have been lodged with the Clerk of this Court.

from Tony's uncle, Tim Liming. Tim refused, but Tony's father (and Tim's brother) Richard Liming lived only a few miles away. Upon learning that Richard was not at home, Combs apparently broke into Richard's house and stole the shotgun that he later used to kill Joan and Peggy Schoonover. Tr. 966.

After driving Tony back to his house, Combs obtained some shotgun shells, loaded the weapon, and taped extra shells to his torso. He then proceeded to drive downtown to the office where Joan and Peggy were getting off work. Combs arrived as they were making their way to their own car. The two women drove away, and Combs chased after them.

Some minutes later, Peggy and Joan pulled into a parking lot in front of another office building. Combs pulled up beside their car and got out of his car. He then smashed the front passenger window of their car with the shotgun and proceeded to shoot Joan and Peggy point-blank, with a single shot to each of their heads. One witness testified that Combs paused between raising the shotgun and firing his first shot, and then paused again before firing the second shot. Tr. 995.[3]

2. The evidence at issue here

Two additional pieces of evidence are especially relevant to the questions presented in this petition. First is a statement that Combs made to the Cincinnati police

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[3] As further evidence of intent and premeditation, the prosecution offered the testimony of a nurse at the hospital where Combs was treated for the gunshot wounds he received from Deputy Sheriff Neil. The nurse testified that, after coming out of surgery, Combs asked her, "what happened to . . . the two bitches that I shot[?]" The nurse, stunned, responded that they were dead. Combs then replied: "serves the Goddamned whores right." Tr. 1089-90.

officer, Douglas Ventre, who arrived at the scene just moments after Deputy Sheriff Neil, having shot Combs, had left to take cover while reloading his revolver. The second is testimony on cross-examination by the expert witness called to support the defense of mental incapacity.

a. The "talk to my lawyer" assertion

Officer Ventre and his partner arrived at the scene a few minutes after the shootings. When Ventre got there, all he knew was what he saw: two women shot in the car, and Combs sitting on the ground, bleeding, with a shotgun in his lap, his finger on the trigger, and "blood all over the place." Tr. 1041. Ventre had no idea who had shot Combs, or where this other shooter was, since Neil had disappeared from the scene and Ventre did not see Neil until he got back to the police station.

As Ventre approached Combs, he told Combs to drop the gun, but Combs began to raise the gun as if to aim at Ventre. Combs, however, "ran out of gas" and dropped his gun back into his lap. Tr. 1043. Ventre ran forward, grabbed the gun from Combs, and took cover behind the victims' car to assess the situation. Having seen the bullet holes in the car, as well as the blood on Combs, Ventre "wasn't sure who else might be in the area shooting." Tr. 1044.

Ventre then approached Combs again and asked what happened. Combs mumbled, "the guy shot me." Tr. 1045. Ventre then asked who shot him, but Combs did not respond. Instead, Combs asked how the people in the car were. When Ventre said he did not know, Combs stopped talking. By that time, the ambulance from the fire department had arrived. As Ventre was helping the fire lieutenant to move Combs, Ventre discovered that

Combs had two shotgun shells taped to his lower abdomen.

The rescue unit then put Combs on a stretcher, and Ventre asked Combs again what happened. Combs responded, "Talk to [my] lawyer." This exchange occurred no more than ten or fifteen minutes after Ventre arrived on the scene. Tr. 1045-46. After Combs told Ventre to talk to his lawyer, Ventre did not ask another question.

When Ventre testified at the trial about the "talk to my lawyer" statement, defense counsel did not object. At the end of Ventre's testimony, the judge instructed the jury:

> [T]he defendant Ronald Dean Combs has a constitutional right not to speak to members of law enforcement without counsel and not to speak to them. You cannot draw any inferences for or against the defendant because he may have requested an attorney or made no further statements to Officer Ventre when he was on the stretcher as Officer Ventre testified to.
>
> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to this testimony in this regard[,] so please remember that.

Tr. 1052-53. Defense counsel did not object to this limiting instruction. Combs did not testify in his own defense.

In closing arguments at the guilt phase of the trial, the prosecution referred to this "talk to my lawyer" statement:

> *Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what is going on?* Isn't that evidence that he realizes the gravity of the situation and at this

time gave that particular comment or response to Officer Ventre?

Tr. 1255 (emphasis added).

b. Dr. Fisher's cross-examination

As part of the defense of mental incapacity caused by excessive intoxication, defense counsel put on the stand a forensic psychologist, Dr. Roger Fisher. On cross-examination, this exchange occurred:

Q. Dr. Fisher, you have rendered an opinion that at the time, July 15th, the defendant was under the influence, is that correct?

A. That's my opinion, yes.

Q. You are not, however, saying that the acts he did on that particular day were not done purposely?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly am not, no.

Q. So he may have been under the influence[,] or your opinion based on what you were told he was under the influence[,] but at the same time he was acting intentionally and purposely when he acted as he did on July 15th; is that correct?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly believe that he was, yes.

Tr. 1183.[4]

On re-direct, Dr. Fisher reiterated that "it would be my conclusion psychologically that his judgment was

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[4] Although this was an opinion on the ultimate issue in the case, Ohio Rule of Evidence 704 expressly permits this kind of expert testimony.

impaired by what was happening to him and what he was ingesting." Tr. 1187. On re-cross, the prosecution asked again whether Combs "wasn't so impaired that he could not form this intent?" Dr. Fisher answered, "That is correct, yes." Tr. 1188.

During closing arguments at the guilt phase of the trial, the prosecution invoked Dr. Fisher's testimony on cross-examination as well as its own evidence of intent and premeditation. After closing arguments, the judge instructed the jury that under Ohio law intoxication is no excuse, but a defendant may attempt to show that he was so intoxicated that his mind lacked the capacity for intent or premeditation. *See* Tr. 1270. The jury convicted Combs on both counts of aggravated murder. In the penalty phase of the trial, Combs was sentenced to death.

3. Post-trial proceedings in state court

In his direct appeal, Combs did not present any claim concerning Dr. Fisher's testimony. He did challenge the admissibility of the "talk to my lawyer" statement, as well as the judge's limiting instruction, but because his counsel had failed to object at trial, appellate review of this claim was under the "plain error" standard. The court, however, found no error at all, because Combs had not received any *Miranda* warnings before he uttered these words. "Here because there was no inducement to silence and no subsequent breach of a promise not to use that silence against the appellant, we do not have the sort of conduct that was disapproved in . . . *Wainwright v. Greenfield* (1986), 474 U.S. 284." App. 304a. And because the court saw no error, it also rejected the additional claim of ineffective-assistance-of-counsel based on the failure to object at trial regarding the "talk to my lawyer" evidence.

The Ohio Supreme Court affirmed, but on harmless error grounds. Because Combs was in custody at the time he told Ventre to "talk to his lawyer," the state supreme court thought that Combs was entitled to receive *Miranda* warnings before being asked what happened.[5] And believing that Combs was entitled to *Miranda* warnings, the court viewed as unconstitutional the prosecution's reliance on Combs' invocation of the right to remain silent. The Ohio Supreme Court, however, ruled this error harmless in light of the other "compelling" evidence of intent and premeditation. App. 278a.[6]

Upon completion of direct appeal, Combs unsuccessfully pursued state post-conviction review. His claim of ineffective-assistance-of-counsel in connection with Dr. Fisher's cross-examination was held to be procedurally barred because it had not been raised on direct appeal.

4. Federal habeas proceedings

On August 30, 1995, Combs filed this federal habeas action under 28 U.S.C. § 2254. He renewed his claims regarding "the talk to my lawyer" evidence and Dr.

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[5] We do not dispute that Combs was in custody when he made this response, but the court's conclusion does not follow from this premise. Rather, Ventre's question – which he asked upon finding live ammunition taped to Combs' torso, just a few minutes after arriving at the crime scene, and at a time when he did not know the identity or whereabouts of the person who shot Combs – properly fell within the "public safety" exception to the *Miranda* warnings requirement. *See New York v. Quarles*, 467 U.S. 649 (1984).

[6] The Ohio Supreme Court also suggested that the "talk to my lawyer" statement was excludable under the State's rules of evidence, but that suggestion is irrelevant here, on federal habeas, because of the court's harmless error holding.

Fisher's cross-examination. As to the former claim, the district court agreed with the Ohio Supreme Court that it was harmless error because the evidence of guilt was "overwhelming." *See* App. 217a, 221a. As to the latter claim, the district court found it procedurally defaulted. *See* App. 174a. Rejecting Combs' other claims as well, the district court denied habeas relief.

The Sixth Circuit reversed and ordered a conditional habeas writ, subject to a new trial. Identifying a sharp conflict among the circuits on whether the Fifth Amendment permits use of pre-arrest silence as part of a prosecution's case-in-chief, the court of appeals sided with the view that finds this use to violate the Fifth Amendment. *See* App. 22a-25a.[7] The court of appeals then found the Fifth Amendment violation to be the predicate for an ineffective-assistance-of-counsel claim.

Turning to the testimony of Dr. Fisher (and ruling the state-court procedural bar inadequate), the Sixth Circuit held that trial counsel violated the Sixth Amendment by putting Dr. Fisher on the stand. Counsel should have known what Dr. Fisher would say when asked whether Combs had been too intoxicated to form intent or premeditation. In a post-conviction deposition, trial counsel acknowledged surprise at Dr. Fisher's testimony on cross-examination, and the court of appeals found it "inexcusable" that defense counsel was caught off-guard in this way. *See* App. 36a.

Having found these deficiencies in trial counsel's performance, the Sixth Circuit ruled that they necessitated a new trial. Despite the State's other evidence of intent and premeditation, the court of appeals considered

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[7] According to the Sixth Circuit, it did not matter whether Combs was in custody when he asserted "talk to my lawyer." Either way, the prosecution's use of this pre-*Miranda* "silence" should be considered, in the court's view, a Fifth Amendment violation.

it a "reasonable probability" that Combs would have been acquitted of intentional and premeditated murder if the jury had not heard either the "talk to my lawyer" statement or Dr. Fisher's testimony. App. 42a.[8] Judge Norris concurred regarding Dr. Fisher's testimony and found that error alone sufficient to issue a habeas writ. The court of appeals has stayed the issuance of its mandate pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This petition presents two questions, both of which warrant this Court's review.

I. This Court should resolve the circuit conflict on the Fifth Amendment question here.

This case presents an important and unresolved question concerning the scope of "the right to remain silent" protected by the Fifth Amendment, as interpreted in *Miranda v. Arizona*, 384 U.S. 436 (1966), and related cases. The specific question here is one left open after this Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284 (1986). There, the Court held that prosecutors may not rely on a defendant's statement expressing a desire to invoke his *Miranda*-related rights, even to rebut a defense of insanity, when the defendant's statement occurred after he had received *Miranda* warnings. Here, the question is whether prosecutors may use a similar statement to rebut a similar defense of mental incapacity when the defendant's statement was made *before* he received *Miranda* warnings.

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[8] In dicta, the Sixth Circuit went on to discuss errors of state law that the Ohio Supreme Court found harmless, but the Sixth Circuit's decision to order habeas relief was not based on this dicta.

In *Greenfield*, the defendant was arrested for sexual battery. Immediately upon handcuffing the defendant, the police officer gave him his *Miranda* warnings. The officer then asked the defendant whether he understood his rights and whether he wished to talk to the police. The defendant responded by saying, "I understand my rights. I do not want to speak to you. I want to speak to an attorney." 474 U.S. at 287 n. 2 (quoting the prosecution's closing summary of the police officer's testimony). At trial, the defendant pleaded not guilty by reason of insanity, and in an effort to rebut this defense, the prosecution called to the stand the arresting officer, who testified to what the defendant said in response to receiving the *Miranda* warnings. The defendant himself did not testify, relying instead on expert psychiatric testimony to support his plea of insanity. In its closing argument, the prosecution pointed specifically to the police officer's testimony, arguing that the defendant's express invocation of his *Miranda* rights contradicted his insanity defense.

Relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court ruled in *Greenfield* that it was unconstitutional for the prosecution to use the defendant's invocation of *Miranda* rights against him, given the implicit promise contained within the *Miranda* warnings themselves that his exercise of these rights would not be so used. The Court's opinion in *Greenfield* makes clear that it was resting its decision on this "implicit assurance" rationale. 474 U.S. at 289-95. This rationale, of course, does not apply in a situation where, as here, no *Miranda* warnings have been given. Thus, the Court in *Greenfield* had no occasion to resolve the specific question presented in this case.

Nor has the Court yet addressed the more general question whether a prosecution, as part of its case-in-chief, may rely on a defendant's silence prior to receipt of

Miranda warnings. This area of *Miranda*-related law has remained open even as the Court has decided other issues concerning a defendant's right to remain silent. For example, this Court has long held that the prosecution may not comment upon a defendant's refusal to take the stand. *Griffin v. California*, 380 U.S. 609 (1965). By contrast, if the defendant does take the stand, then the prosecution may use the defendant's pre-*Miranda* silence to impeach the defendant's credibility. *Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982) (per curiam); *accord Brecht v. Abrahamson,* 507 U.S. 619, 628, 639 (1993) (discussing permissible references to pre-*Miranda* silence). And, as both *Doyle* and *Greenfield* make plain, once a defendant has received *Miranda* warnings, silence thereafter may not be used against the defendant, whether either as part of a prosecution's case-in-chief or for impeachment purposes. Yet, as the Court itself has expressly acknowledged, none of these cases has required a decision on the question whether, or in what circumstances, pre-*Miranda* silence may be part of a prosecution's case-in-chief. *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980).[9]

A. This case presents a compelling context for review of the Fifth Amendment question.

The general question concerning the use of pre-*Miranda* silence can arise in various permutations. First, rebuttal use of pre-*Miranda* silence differs from cases in

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[9] The district court's decision in *Brecht* reveals that the defendant's trial there involved the prosecution's use of pre-*Miranda* silence both as part of its case-in-chief and for impeachment purposes. *See Brecht v. Abrahamson* 759 F. Supp. 500, 503 (W.D. Wis. 1991). As that case came before this Court, however, apparently only the impeachment use of this silence was at issue.

which the defendant has done nothing to put at issue his reliance on the right to remain silent. Second, express invocation of *Miranda*-related rights contrasts with cases of pure silence, where the defendant does not utter any words at all.

In this case, we have both rebuttal and an express invocation of *Miranda* rights, making the prosecution's reference to the defendant's pre-*Miranda* "silence" especially appropriate. Here, the State's use of Combs' "talk to my lawyer" statement is not an attempt to equate silence with a guilty conscience, as a way of avoiding the prosecution's burden of coming forward with actual evidence of guilt. Instead, Combs' statement is offered specifically to rebut his own defense that he was mentally incapacitated at the time he killed Peggy and Joan Schoonover. Once the defendant puts his own mental capacity at issue, his "talk to my lawyer" statement becomes relevant evidence, because it is specifically probative on whether he had the cognitive capacity to engage in purposeful conduct.

1. Rebuttal. There is no doubt that Combs himself, at the very outset of the trial, put his cognitive capacity at issue. In his opening statement, Combs' counsel made clear that lack of mental capacity (caused by excessive intoxication) would be the only defense to the charge of intentional and premeditated homicide. *See* Tr. 909-10. Thus, the defense opened the door to relevant evidence that Combs, in fact, had the mental capacity to act purposefully at the time of the homicides. The trial judge, moreover, understood this evidentiary distinction and so instructed the jury.

In this respect, the rebuttal use of pre-*Miranda* silence is closely analogous to its use for purposes of impeachment, which this Court has already upheld in *Fletcher* and *Brecht*. When a defendant himself testifies that he stabbed another man in self-defense, it is

probative of defendant's credibility that he did not offer this excuse when he was arrested for murder. *Fletcher*, 455 U.S. at 607. Likewise, when a defendant (through the testimony of others) claims that he was too intoxicated to know what he was doing at the time he shot two women, it is probative of the credibility of this defense that, within a few minutes after these shootings, he was capable of asserting "talk to my lawyer" in response to the question "what happened?"

This Court has already indicated that rebuttal, like impeachment, should be distinguished for Fifth Amendment purposes from those cases in which the defense has done nothing to open the door to evidence that the defendant chose to remain silent. "[W]here as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by [the] defendant or his counsel, we think there is no violation of the privilege." *United States v. Robinson*, 485 U.S. 25, 32 (1988).[10] Consequently, this Court should not let stand, without review, the Sixth Circuit's decision here, which did not consider rebuttal a distinguishing context.

2. Express utterance. The rebuttal use of Combs' "talk to my lawyer" statement is even more compelling precisely because it involves an express statement rather than pure silence. While pure silence in the presence of police may indicate nothing more than timidity or fear, the affirmative utterance of the assertion "talk to my lawyer" undeniably indicates a cognitive capacity to form certain thoughts and words. As then-

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[10] In *Robinson* (*id.*), the Court also quoted Justice Stevens' concurrence in *United States v. Hastings*, 461 U.S. 499, 515 (1983): "I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses of the defendant's case."

Associate Justice Rehnquist observed in his concurrence in *Greenfield*, "a request for a lawyer . . . is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused." 474 U.S. at 297.

Thus, the facts here present a particularly strong case for showing the error of the Sixth Circuit's blanket proposition that the Fifth Amendment in all circumstances bars the use of a defendant's invocation of the right to remain silent as part of a prosecution's case-in-chief. Under the Sixth Circuit's *per se* rule, in no circumstances — except strictly for impeachment of a defendant who has taken the stand — is it ever proper for prosecutors to rely on a defendant's silence or invocation of Fifth Amendment rights. If that is the law in this area, it would be especially instructive to prosecutors around the country to learn this development, for presently the lower courts are far from united on this proposition.

B. The circuits are in conflict on this Fifth Amendment question.

As the Sixth Circuit extensively discussed, the courts of appeals are sharply divided on the question whether pre-*Miranda* silence may be used in a prosecution's case-in-chief. *See* App. 22a-25a. The conflict, however, is even broader and sharper than the Sixth Circuit described. There are six circuits which, contrary to the Sixth Circuit, would permit the rebuttal use of pre-*Miranda* silence as occurred here: the Third,[11]

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[11] *See United States v. Isaac*, 134 F.3d 199, 206-07 (3d Cir. 1998) (prosecutor's rebuttal "was a fair response to defense counsel's closing argument").

Fourth,[12] Fifth,[13] Seventh,[14] Eighth,[15] and Eleventh.[16] By contrast, four other circuits have ruled against the use of pre-*Miranda* silence as part of a prosecution's case-in-chief: the First,[17] Ninth,[18] Tenth,[19] and D.C.[20] None of

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[12] *United States v. McNatt*, 931 F.2d 251, 258 (4th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992) (defendant "was well aware that if he claimed the cocaine had been planted in his truck by Officer Clarke, the prosecutor would be allowed to comment on his refusal to allow a search at the time most important to this issue"). *See also United States v. Williams*, 405 F.2d 14, 17 (4th Cir. 1968) (permitting use of pre-*Miranda* silence, as part of a prosecution's case-in-chief, in an early post-*Griffin* decision).

[13] *United States v. Zanabria*, 74 F.3d 590, 592-93 (5th Cir. 1996) (not unconstitutional for prosecutors, in rebutting a defense of duress, to rely on defendant's silence when customs agents found cocaine in his luggage).

[14] *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990).

[15] *See United States v. Rederth*, 872 F.2d 255, 257-58 (8th Cir. 1989).

[16] *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) ("the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given").

[17] *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989).

[18] *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), *cert. pending on other grounds*, No. 00-5083 (petition filed June 28, 2000). Although the Sixth Circuit listed the Ninth Circuit as contrary to its own position here, based on an earlier decision in *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998), the Ninth Circuit's later decision in *Whitehead* indicates that prosecutors may not use, as part of their case-in-chief, silence that occurs after an individual has been placed in custody but before he has received *Miranda* warnings.

[19] *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991).

[20] *United States v. Moore*, 104 F.3d 377, *reh'g denied*, 110 F.3d 99 (D.C. Cir. 1997). Judge Silberman, however, disagreed with the majority in *Moore* and would have adopted a view that supports our position here: "it is only after a *Miranda* warning, or at the very minimum, the time that a *Miranda* warning

these latter four cases, however, involve rebuttal specifically. Indeed, to our knowledge, no other circuit has adopted the extreme position of the Sixth Circuit here, which would bar even pre-*Miranda* "silence" in the form of an express invocation of the right to counsel, when that express utterance rebuts a defense of cognitive incapacity.[21]

Most pointedly, the Seventh Circuit has adopted precisely the opposite position from the Sixth Circuit in a case with facts functionally identical to those existing here. *See Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990).[22] In *Thomas*, the only defense to the charge of murder was insanity. To rebut this defense, the prosecution put on testimony that, at the time of his arrest but before *Miranda* warnings, the defendant asked for a lawyer. In an opinion by Judge Posner, the Seventh Circuit observed that this use, for rebuttal purposes, of the pre-*Miranda* request for an attorney was permissible. As the court explained, "since the request was made before he was given his *Miranda* warnings, this testimony did not violate *Greenfield*." *Id.* at 1416.

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should have been given, that a defendant's silence could be thought protected." *Id.* at 394. (Silberman, J., concurring in result) (citation omitted).

[21] In a recent opinion, the Sixth Circuit has confirmed that its holding here turns on the fact that Combs did not take the stand. *See Seymour v. Walker*, 2000 WL 1154017, at *13 (Aug. 16, 2000). Thus, the Sixth Circuit refuses to recognize the need to permit the *rebuttal* as well as *impeachment* use of pre-*Miranda* silence.

[22] Citing *United States ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987), the Sixth Circuit listed the Seventh Circuit as agreeing with its view of the Fifth Amendment, but the Seventh Circuit's subsequent decision in *Thomas* reveals that *Lane* does not apply where, as here, an affirmative utterance (rather than pure silence) is used to rebut a defense of mental incapacity.

In *Dickerson v. United States*, 120 S.Ct. 2326, 2334-35 (2000), this Court recognized the need, from time to time, to refine the contours of the *Miranda*-related jurisprudence that has developed in the interpretation of the Fifth Amendment. It has been almost fifteen years since *Greenfield*, and in that intervening period considerable confusion has arisen among the lower courts concerning not only the scope of *Greenfield* itself, but also the scope of other related precedents, including *Griffin* and *Fletcher*. This case offers a factually compelling context in which to clarify this particular area of *Miranda*-related law.

C. There is no impediment to this Court's review of the Fifth Amendment issue.

The fact that Combs was in custody at the time he uttered "talk to my lawyer" is no obstacle to a grant of certiorari. If our view is correct, as held in six circuits, then the critical fact is that this utterance occurred prior to the issuance of *Miranda* warnings. Moreover, even though Combs was in custody, no *Miranda* warnings were required at the specific time Officer Ventre asked Combs the question which prompted the "talk to my lawyer" response. As already noted (page 8, n. 5 *supra*), given the particular factual circumstances, this question was entirely reasonable in light of Officer Ventre's legitimate concern for public safety at the time. Thus, this case properly presents the question whether the Fifth Amendment bars evidence of a defendant's silence at a time when *Miranda* warnings were neither given nor required.

Nor is it an obstacle to this Court's review of this *Miranda*-related issue that it arose on federal habeas in connection with a Sixth Amendment ineffective-assistance-of-counsel claim. The Sixth Circuit squarely

predicated its finding of ineffectiveness on its antecedent holding that the "talk to my lawyer" evidence was a Fifth Amendment violation to which defense counsel should have objected. App. 31a. Consequently, this Fifth Amendment issue is properly before this Court for review. And were this Court to reverse the court of appeals on this Fifth Amendment issue, the "talk to my lawyer" evidence (being permissible) would provide no basis for a Sixth Amendment violation, since no prejudice could have resulted from defense counsel's failure to object.[23]

In short, an important and unresolved question of Fifth Amendment law, on which the circuits are sharply divided, is properly before this Court in a factually compelling case, and this Court should exercise its certiorari jurisdiction here.

II. The issue of *Strickland* "prejudice" also deserves this Court's review.

This case also raises an important and open issue about the basic meaning of "prejudice" for purposes of the analysis required by *Strickland v. Washington*, 466 U.S. 668 (1984). Can it count as "prejudicial" under *Strickland* that a defense witness on cross-examination provides testimony that confirms the defendant's guilt? In one

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[23] Similarly, this Court's review of the Fifth Amendment issue is unaffected by the Ohio Supreme Court's suggestion that the "talk to my lawyer" statement was excludable under the State's rules of evidence. The Ohio Supreme Court held that the admission of this statement into evidence was harmless, and therefore it cannot qualify as *Strickland* prejudice that defense counsel failed to object on state-law grounds. Accordingly, as this case comes to this Court on federal habeas under 28 U.S.C. § 2254, a ruling in our favor on the Fifth Amendment question would remove one of the two grounds the Sixth Circuit relied upon in ordering habeas relief.

sense, this testimony could be considered prejudicial if the jury likely would have acquitted the defendant had it not heard this testimony. In another sense, however, this testimony should not be considered prejudicial, because there is nothing incorrect or unfair about a conviction that results after the jury has heard from the defendant's own witness that the defendant is indeed guilty.

In this case, under either conception of *Strickland* prejudice, the Sixth Circuit's decision should be reversed. Even if the proper focus of the prejudice inquiry addresses only the likelihood that the jury would have acquitted the defendant had it not heard this additional evidence of guilt, the Sixth Circuit had no basis to issue a writ of habeas corpus here, since there is no "reasonable probability" that the jury would have acquitted Combs. Indeed, this point is true even supposing the jury had heard neither Dr. Fisher's cross-examination nor the "talk to my lawyer" statement.

We would urge this Court, however, that there is no need to conduct this probability analysis where, as here, the defendant is complaining that one of his own witnesses on cross-examination provided probative and competent evidence tending to confirm the defendant's guilt. As this Court said in *Strickland* itself, the purpose of the right to effective assistance of counsel guaranteed by the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial." 466 U.S. at 689. Simply put, there is no basis for claiming the denial of a "fair trial" on the ground that a defense witness unexpectedly provides evidence of defendant's guilt in response to entirely legitimate questions from the prosecution on cross-examination.

Accordingly, we ask that this Court grant certiorari here to consider, first, whether this "fair trial" understanding of *Strickland* prejudice is correct. If so, then this Court should reverse the Sixth Circuit's finding

of prejudice without need for further review of the other evidence of guilt in the record. If not, then we would ask that the Court proceed, secondly, to review whether there is a "reasonable probability" that the jury would have acquitted Combs had it not heard Dr. Fisher's cross-examination.[24] The Sixth Circuit's finding of "reasonable probability" is plainly insupportable on the record here. Thus, either way, this Court should grant certiorari to review the Sixth Circuit's improper holding on the issue of *Strickland* prejudice.

A. This Court's opinions support our conception of *Strickland* prejudice.

This Court's opinions on ineffective-assistance-of-counsel, from *Strickland* through *Williams v. Taylor*, 120 S. Ct. 1495 (2000), accord with our view that under the Sixth Amendment the inquiry should be whether Combs was denied *a fair trial* as a result of the prosecution's effective cross-examination of Dr. Fisher. In *Strickland* itself, this Court repeatedly emphasized that, in defining what qualifies as a cognizable claim of ineffective-assistance-of-counsel, "we must take its purpose – to ensure a fair trial – as the guide." 466 U.S. at 686.[25] Thus, the Court added: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as

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[24] If (contrary to our Fifth Amendment argument) the "talk to my lawyer" statement should have been excluded from the jury, then the "reasonable probability" analysis would put aside this evidence as well.

[25] *See also id.* at 691-92: "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."

having produced a *just* result." *Id.* (emphasis added). Similarly, in the companion case to *Strickland*, the Court reiterated: "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984).

The Court's subsequent opinions confirm that, under the *Strickland* standard of prejudice, a conviction should not be overturned because of a defense counsel's error, unless that error renders the verdict of guilt unreliable. In *Nix v. Whiteside*, 475 U.S. 157 (1986), this Court refused to permit a defense counsel's decision to keep his client from committing perjury to qualify as prejudice for *Strickland* purposes. Even if the jury might have been swayed by the perjured testimony, the actual verdict of guilt returned by the jury was not rendered unreliable by the fact that the jury did not get to hear this perjury. *See Nix*, 475 U.S. at 175. Likewise, in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Court held that a defendant is not entitled to a new trial (or, in a capital case, a new sentencing proceeding) because defense counsel failed to make an objection that would have been successful under then-prevailing circuit law but should not have been successful given a subsequent correction in the applicable legal standard. As the Court emphasized, the defense counsel's failure to object on ultimately erroneous grounds did not render the result of the original trial either "unreliable" or "unfair." *See id.* at 366, 369, 371.

Moreover, in his concurrence in *Kimmelman v. Morrison*, 477 U.S. 365, 391, 397 (1986), Justice Powell suggested that defense counsel's failure to object to the admissibility of illegally obtained evidence could not qualify as prejudicial under *Strickland*, as long as the damaging evidence was otherwise probative and reliable. In that case, the defendant had been tried and convicted

of rape, and defense counsel failed to object to the admission of a semen-stained bedsheet obtained from the defendant's dwelling without a warrant. Because this evidence was reliable and probative of guilt – and would undoubtedly be admissible but for the exclusionary rule applicable to Fourth Amendment violations – Justice Powell reasoned that the defendant was not unfairly convicted because of his counsel's failure to timely invoke the exclusionary rule. "The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder make a well-informed determination of respondent's guilt or innocence." *Id.* at 397.[26]

Although Justice Powell's point has evident power, our position here need not go so far. The bedsheet in *Kimmelman* was obtained in violation of the Fourth Amendment (or at least the case came to this Court predicated on that assumption). Even if this evidence was reliable and probative, under the exclusionary rule the defendant was entitled to have it kept out of the trial. Defense counsel's failure to keep it out arguably deprived the defendant there of the right to confine the prosecution to evidence obtained in conformity with the Constitution's commands.

By contrast, Dr. Fisher's testimony was not unconstitutional or otherwise unlawful. There was nothing improper in the prosecution's cross-examination of Dr. Fisher concerning the exact nature of his expert opinion regarding the degree of Combs' intoxication and its effect on his cognitive capacity. For these reasons,

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[26] The Seventh Circuit has also expressly adopted this view. *See Holman v. Page*, 95 F.3d 481, 491 (7th Cir. 1996), *reh'g denied*, 102 F.3d 872 (7th Cir. 1996), *cert. denied*, 520 U.S. 1254 (1997). As this view necessarily entails a rejection of the Sixth Circuit's position regarding Dr. Fisher's cross-examination, the Sixth and Seventh Circuits are in direct conflict on the second as well as the first question presented in this petition.

even if it might be said (contrary to Justice Powell) that the defendant in *Kimmelman* suffered unfair prejudice because his lawyer failed to make a timely Fourth Amendment objection to the bedsheet evidence, it cannot be said here that Combs suffered unfair prejudice simply because the prosecution was able to conduct an effective cross-examination of a defense witness.

Last Term's decision in *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (opinion of the Court on this issue per Justice Stevens), is not to the contrary. That case concerned a defense counsel's failure to discover *exculpatory* evidence that might well have caused the jury to exonerate the defendant. (The exculpatory evidence there was presented at the sentencing phase of a capital case, but the same principle would apply to the guilt phase as well.) This case, conversely, involves counsel conduct that caused the jury to hear additional *inculpatory* evidence. In evaluating a claim of *Strickland* prejudice, these two situations are worlds apart. A primary function of a defense attorney in a criminal trial is to put before the jury evidence that exonerates the defendant. A defense lawyer who fails to give the jury such exonerating evidence truly deprives the defendant of the reliable and fair trial that the Sixth Amendment protects. "Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of *exculpatory* information not disclosed to the defense by the prosecution." *Strickland*, 466 U.S. at 694 (emphasis added).

On the other hand, putting before the jury a witness whose cross-examination tends to confirm the defendant's guilt does not keep exculpatory information from the jury. It does not prevent the jury from hearing evidence that might have been a basis for an acquittal. The conviction that results from the jury's hearing, out of the mouth of a defense witness, extra evidence of the

defendant's guilt is neither unreliable nor unfair – and thus should not be considered prejudicial in the sense of *Strickland*.

B. There is no "reasonable probability" of an acquittal.

In any event, even under the alternative conception of *Strickland* prejudice, which asks only whether there is a "reasonable probability" that the defendant would have been acquitted in the absence of counsel's error, there is no such "reasonable probability" here. As the Ohio Court of Appeals, the Ohio Supreme Court, and the federal district court all found – contrary to the Sixth Circuit – the evidence of intent and premeditation was overwhelming. This is true even taking away the "talk to my lawyer" statement, as well as Dr. Fisher's testimony on cross-examination.

As detailed in the opening statement of this petition (pages 2-3, above), the evidence of intent and premeditation included the several hours and many miles that Combs drove in search of a gun and ammunition. It also included the evidence that Combs hunted down the Schoonovers in their car, smashed in the car window, and then paused before firing a shot to each of their heads. (And it included as well the statement Combs made to the nurse upon coming out of surgery for his gunshot wounds. *See* n.3, *supra*.) In light of all this evidence, it is not "reasonably probable" that the jury would have found Combs not guilty of intentional and premeditated murder.

In concluding otherwise, the Sixth Circuit apparently believed that, because the "talk to my lawyer" statement and Dr. Fisher's testimony were especially strong evidence concerning Combs' mental capacity, it must follow that without this evidence there would have

been a "reasonable probability" of a different result.[27] But the court's conclusion does not follow from its premise. Under the "reasonable probability" standard, the task is to judge, not whether the remaining evidence is relatively weaker than what the jury never should have heard, but instead how strong is this remaining evidence on its own. And here the remaining evidence is plenty strong enough.

The Sixth Circuit also suggested that this remaining evidence was consistent with the possibility that Combs was planning to commit suicide. App. 41a. But this suggestion is demonstrably incorrect: most particularly, the suicide theory is inconsistent with the fact that Combs taped extra shotgun shells to his abdomen. It is simply untenable to maintain that there is a *reasonable probability* – as opposed to a mere "theoretical possibility" – that the jury would have accepted this suicide theory as a basis for acquitting Combs of intentional and premeditated murder. *See Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (citing *Evans* for proposition that there is no *Strickland* prejudice when it is "inconceivable" that an intoxication defense would have been successful).

In sum, the Sixth Circuit's decision is error under either conception of *Strickland* prejudice, and thus the *Strickland* issue here warrants this Court's review along with the Fifth Amendment question presented.

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[27] Immediately after saying that the prosecution's case would have been "much weaker" without these two disputed pieces of evidence, the Sixth Circuit said: "We *therefore conclude* that absent defense counsel's errors, there is a reasonable probability that the jury would have concluded that the State did not meet its burden proving [intent and premeditation]." App. 42a (emphasis added).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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